Supreme Court, U.S.
FILED

941804 MAY 2 - 1995

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1994

WILLIAM WILLIAMS, *et al.*,

Petitioners,

vs.

ASHLAND ENGINEERING, *et al.*,

-and-

UNITED STATES FIDELITY & GUARANTY CO. and R.W. GRANGER AND SONS, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT O. BERGER, III
Attorney for Petitioners
470 Atlantic Avenue
11th Floor
Boston, Massachusetts 02110
(617) 423-7575

6727
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Does the Employment Retirement Security Act (ERISA), 29 U.S.C. §§1001 *et seq.* preempt a Massachusetts public works performance bond statute, Mass. Gen. L. ch. 149, § 29 which is remote from the funding, management and control of any ERISA plan?

2. Does the Massachusetts law of suretyship control the claim?

3. Does ERISA's insurance exemption clause bar the application of preemption principles to the Massachusetts law?

LIST OF PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants:

William Williams, Charles DeRosa, Walter Ryan, Jr., George Davagian, Jr., William Reynolds, and John Shaughnessy, Jr., Trustees of International Union of Operating Engineers Local 4 Pension Fund, and James T. Griffin, William Reynolds, Jr., Robert Berry, James L. Conway, Dominic Papagini, and John Shaughnessy, Jr., Trustees of International Union of Operating Engineers Local 4 Health and Welfare Fund,

Defendants-Appellees:

United States Fidelity and Guaranty Company and R. W. Granger & Sons, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
A. The Course of Proceedings in the Courts Below	2
B. Statement of Facts	3
Reasons for Granting the Writ	4
I. Mass. Gen. L. ch. 149, § 29 is too remote to preempt ERISA.	4
II. Under the Law of Massachusetts, the respondents are liable as sureties.	10
III. ERISA's insurance exemption bars preemption.	12
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Continental Bronze Co. v. Salvo & Armstrong Steel Co., Inc., 8 Mass. App. Ct. 799, 397 N.E. 2d 1143 (Mass. App. Ct. 1979) 10

Cuomo v. Travelers, cert. granted, October 7, 1994, Docket Nos. 93-1408, 93-1404, 93-1415 12

Fort Halifax Packing, Inc. v. Coyne, 482 U.S. 1 (1987) ..6, 7, 8, 9

Giardello v. Balboa Ins. Co., 837 F.2d 1566 (11th Cir. 1988) 10

Gilbert v. Burlington Indus., 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986) 6

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) .. 5

Keystone, Chapter, Etc. v. Foley, 37 F.3d 945 (3rd Cir. 1994), *petition for cert. filed*, 61 U.S.L.W. 1264 (U.S. October 7, 1994) 1, 2, 5

Kwatchler v. Massachusetts Service Employment Pension Fund, 879 F.2d 957 (1st Cir. 1989) 9

Local 538, etc. v. United States Fidelity and Guaranty Company, U.S. Dist. Ct. Vermont, Slip Op. 2:93-cv-69, *appeal pending in Second Circuit* 10, 11

Contents

Page

Mackey v. Lanier Collections Agency & Ser., Inc., 486 U.S. 825 (1988) 10

Massachusetts v. Morash, 490 U.S. 107 (1989) 7, 8, 9

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992) 14

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 12, 13, 14

Miami Valley Carpenters Dist. Council Health & Welfare Fund v. USF&G Company, 590 F. Supp. 61 (D.C. Ohio 1984) 10, 11

Minn. Chapter of Assoc. Builders v. Dept. Labor, 47 F.3d 975 (8th Cir. 1995) 1, 5, 9

New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N.E. 410 (1908) 12

Pace v. Signal Technology Corp., 417 Mass. 154, 628 N.E. 2d 20 (Mass. 1994) 6

Peters v. Hartford Accident & Indemnity Co., 377 Mass. 863, 389 N.E. 2d 63 (Mass. 1979) 14

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 7, 9

Teper v. Park West Galleries, Inc., 431 Mich. 202, 427 N.W. 2d 535 (1988) 6

Contents

	Page
Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 458 (1957)	9
United States v. Carter, 353 U.S. 210 (9th Cir. 1957)	8
Statutes Cited:	
28 U.S.C. § 50	9
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1144(b)(2)(A)	2
28 U.S.C. § 2101(c)	1
29 U.S.C. § 1001 *et seq.*	*passim*
29 U.S.C. § 1132(a)(3)(B)(ii)	3
29 U.S.C. § 1144(a)	2
29 U.S.C. § 1144(c)(1)	4
40 U.S.C. § 270b(a)	8
40 U.S.C. § 270a *et seq.*	8

Contents

	Page
Mass. Gen. L. ch. 149, § 29	i, 2, 4, 5, 8, 12, 13, 14
Mass. Gen. L. ch. 175, § 47B	12, 13
Mass. Gen. L. ch. 175, § 105	13
Mass. Gen. L. ch. 175, § 107	13
Mass. Gen. L. ch. 176D	12
Rule Cited:	
Federal Rule of Appellate Procedure 40	1
Other Authorities Cited:	
120 Cong. Rec. 29197 (1974)	4
Couch on Insurance 2d, Vol. 15A, § 57:115-128 (1994 ed.)	11
Couch on Insurance 2d 57:129-134	10
U.S. Dept. of Labor, Advisory Opinion, April 5, 1993, W.L. 171827*1	13
APPENDIX	
Appendix A — Opinion of the United States Court of Appeals for the First Circuit Dated January 31, 1995	1a

Contents

Page

Appendix B — Judgment and Opinion of the United States District Court for the District of Massachusetts Dated September 12, 1994 ..... 12a

Appendix C — Order Denying Petition for Reconsideration Entered February 21, 1995 ..... 20a

Appendix D — Order of the First Circuit Court of Appeals Denying the Petition for Rehearing Entered February 15, 1995 ..... 21a

OPINIONS BELOW

The opinion of the United States Court of Appeals which is the subject of this Petition was rendered on January 31, 1995 and is reported as *Williams v. Ashland Engineering Co., Inc.*, __ F.3d __, 1995 WL 29559 (lst Cir. 1995).

A judgment was entered in Petitioner's suit styled *Williams v. Ashland Engineering Co., Inc.* on September 12, 1994 by the United States District Court for the District of Massachusetts in Civil Action No. 92-11733 and is reported as *Williams v. Ashland Engineering Co., Inc.*, 863 F. Supp. 46 (1994).

These opinions are reproduced in the Appendix to this Petition.

STATEMENT OF JURISDICTION

Petitioners seek review of a judgment of the Court of Appeals for the First Circuit entered on January 31, 1995. A Petition for Rehearing was timely filed and denied on February 15, 1995. App. 21a. Another petition for rehearing pursuant to FRAP 40 was timely filed and was denied on February 21, 1995. App. 20a. Jurisdiction in the trial court was based on Title 28, United States Code § 1331 and jurisdiction in the Court of Appeals was based on Title 28, United States Code § 1291.

This Court has jurisdiction pursuant to Title 28, United States Code, §§ 1254(1) and 2101(c) and Supreme Court Rule 10. There is a conflict between the opinion of the First Circuit Court of Appeals in this case and those of two other circuit courts of appeal on the issues decided by the court below as to ERISA preemption. *See Williams, supra,* at 5a-11a, and compare with *Minn. Chapter of Assoc. Builders v. Dept. Labor,* 47 F.3d 975, 979, 980 (8th Cir. 1995) or *Keystone, Chapter, Etc. v. Foley,* 37

F.3d 945 (3rd Cir. 1994), *petition for cert. filed,* 63 U.S.L.W. 3564 (U.S. Jan. 17, 1995). This First Circuit Court of Appeals has settled an important question of the federal law of ERISA which has not been, but should be, settled by this Court. *See also, Cuomo v. Travelers,* 14 F.3d 708 (2nd Cir. 1993), *petition for cert. allowed,* 61 U.S.L.W. 1264 (U.S. October 17, 1994).

STATUTORY PROVISIONS INVOLVED

Mass. Gen. L. ch. 149, § 29 provides in pertinent part that "trustees . . . authorized to collect such payments for health and welfare plans . . . shall be entitled to the benefit of the security . . . for a maximum of two hundred and forty calendar days".

29 U.S.C. § 1144(a) provides in pertinent part that ERISA preempts every state law which "relates to an employee benefit plan. . . ."

29 U.S.C § 1144(b)(2)(A) provides in pertinent part that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."

STATEMENT OF THE CASE

A. The Course of Proceedings in the Courts Below

The petitioners are the trustees of the International Union of Operating Engineers Local 4 Pension and Health and Welfare Funds, which are employee benefit plans governed by ERISA. On July 30, 1992, the petitioners amended their complaint. On August 24, 1992, respondents' counsel filed their appearances. On September 15, 1992, respondents filed answers to the amended complaints. The answers lacked the affirmative defense of preemption. Discovery was completed as of April 15, 1993,

and the deadline for filing summary judgment motions was on July 1, 1993. Both parties filed motions for summary judgment.

Count I of the amended complaint is a claim against Ashland for employer contributions under § 502(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1132(a)(3)(B)(ii). Ashland has not defended this action. Count II states a claim against USF&G for payment under the bond because "plaintiffs demanded payment under such bond . . . in accordance with federal and state law but USF&G refused and neglected to pay such amount for hours worked by members of Local 4." Count III seeks to reach and apply the surety bond obtained by Granger.

The petitioners moved for summary judgment on Counts II and III. USF&G and Granger moved for summary judgment on the same counts. The District Court entered summary judgment for USF&G and Granger, and entered separate judgments for them on September 12, 1994. On January 31, 1995, the Court of Appeals for the First Circuit affirmed the District Court and on February 15, 1995 denied the Petition for Rehearing.

B. Statement of Facts

Local 4 members of the International Union of Operating Engineers performed heavy machinery work for defendants Ashland Engineering Company, Inc., C&B Construction Company, Inc., and Ashanti/Ashland (collectively "Ashland"), the subcontractors for a Massachusetts Port Authority construction project at Logan Airport in East Boston, Massachusetts in 1991. Ashland abandoned performance and became delinquent in its employer contributions. Respondent R.W. Granger and Sons, Inc. ("Granger"), the general contractor for the Massport project, obtained a surety bond from respondent United States Fidelity and Guaranty Company ("USF&G"). The labor and materialmen's performance bond dated April 25, 1990

was in the sum of $23,191,643 and was purchased by Granger as principal and USF&G as surety relative to a Massport construction project of cargo buildings at Logan Airport. The bond secures payment for labor, materials, employer contributions to "health and welfare funds," and other expenses of the Massport project. The payee of the USF&G surety bond is Massport.

REASONS FOR GRANTING THE WRIT

I.

MASS. GEN. L. CH. 149, § 29 IS TOO REMOTE TO PREEMPT ERISA.

Congress enacted 29 U.S.C. § 1144 (a), generally referred to as the ERISA "preemption clause," in order to ". . . round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation," 120 Cong. Rec. 29197 (1974) (remarks of Rep. John Dent, Chairman of the Subcommittee on Education and Labor). Congress defined "state law" to include "all laws, decisions, rules, regulations, or other state action having the effect of law, of any state." 29 U.S.C. § 1144(c)(1). The lower court, however, in finding ERISA preemption in this action, did not preserve carefully crafted protection for participants provided by the Commonwealth of Massachusetts.[1]

The result reached by the lower court is not necessary and can be avoided by this Court's clarifying what laws *relate to* ERISA plans and *what laws do not*. This Massachusetts statute

---

1. Inexplicably, the lower court never considers that plaintiffs are trustees for both a *pension plan* and a health and welfare plan. Section 29 says absolutely nothing about pension plans but the District Court finds preemption of a pension fund claim.

does not. The lower court's ruling has the effect of taking 18 cents out of every dollar earned by participants.

Recently, the Third Circuit stated that the "test for preemption in this regard is whether the existence of ERISA plans is necessary for the statute to be meaningfully applied." *Keystone, supra,* at 957. The lower court in this action says this standard does not apply because the *Keystone* Court relied on First Circuit authority for ERISA preemption of the implementation aspect of the law. However, even more recently, in *Minn. Chapter, supra,* at 975 to 981, the Eighth Circuit did not find preemption of the implementation aspect of the state law; and, above all, it found impermissible ERISA preemption of a state wage and labor statute. Under the application of the *Minn. Chapter* test, Mass. Gen. L. ch. 149, § 29 would clearly not be preempted by ERISA.

The payment bond involved here functions "irrespective of the existence of an ERISA plan." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139 (1990). Statutes like the payment bond statute of Massachusetts may make incidental reference to plans without coming within one of the categories of laws that are preempted by ERISA. ERISA preemption should not disrupt state statutory claims that may "relate to" a plan only in the broadest sense of the term. This Massachusetts statute also refers to unemployment benefits among many other matters. Moreover, the payment bond provision here does not "relate to" or "regulate" any ERISA plan, since it *does not create any additional funding mechanisms and does not single out ERISA plans for special treatment.*[2]

---

2. The lower court's analysis seems to be that any mention of benefits triggers preemption. At the most Section 29 mentions a kind of benefit scheme but says nothing about employee benefit plans. Section 29 speaks of a default causing a right to payment under a bond but the law has nothing to say about benefit plans' regulation. ERISA does not preempt state employee benefits

(Cont'd)

The lower court ignores the highest court of Massachusetts in its decision. In *Pace v. Signal Technology Corp.*, 417 Mass. 154 at 160, 628 N.E.2d 20 at 23 (Mass. 1994), the Supreme Judicial Court of Massachusetts held that:

> When the resolution of state law claims will neither "determine whether any benefits are paid" nor "directly affect the administration of benefits under the plan," the claims do not "relate to" ERISA and accordingly are not pre-empted.[3]

Because in the instant action petitioners are not seeking benefits under a plan, and because, if they ultimately prevail, any award against respondents would not "directly affect the administration of benefits under the plan," petitioners' claims do not relate to ERISA and are not preempted. As the Supreme Judicial Court explained in *Pace, id.:*

> Congress's desire for a broad Federal pre-emption of State laws relating to benefit plans was motivated by its desire to encourage employers to maintain plans in favor of employees, by eliminating the risk of inconsistent and confusing layers of regulation.

As the Supreme Judicial Court emphasized, "that Statute whose

---

(Cont'd)
laws, but merely laws relating to plans. *See Fort Halifax Packing, Inc. v. Coyne*, 482 U.S. 1 (1987).

3. *See also, Gilbert v. Burlington Indus.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd*, 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986). *See Teper v. Park West Galleries. Inc.*, 431 Mich. 202, 214, 427 N.W. 2d 535 (1988).

clear purpose was to benefit employees has become widely used as a shield to protect employers from any deceptive and wrongful acts they may have committed against their employees is an irony we find unacceptable as a governing principle of law." *Id. See also, Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-11 (1987).

The United States Supreme Court has recognized that, in seeking to preempt all state laws that "relate to" employee benefit plans, Congress could not have intended to preempt all laws having *any* impact on such plans. "Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In *Fort Halifax, supra*, the Supreme Court held that Maine's severance pay statute requiring employers to provide a one-time severance payment in the event of a plant closing was not preempted by ERISA (or the NLRA). The Court declared that the ERISA preemption clause does not preempt state laws relating to employee benefits, but only those laws relating to employee benefit *plans*. *Id.* at 11.

In *Massachusetts v. Morash*, 490 U.S. 107 (1989), relying upon *Fort Halifax*, the Court held that a state criminal statute requiring an employer to pay all wages due, including vacation pay, on the day of discharge was not preempted by ERISA. Noting that a number of other states had such statutes, the Court stated:

> The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with the "separate spheres of governmental authority preserved in our federalist system."

Morash, supra, 490 U.S. at 119, quoting *Fort Halifax*, 482 U.S. at 19. In fact, the fringe benefits in question here are really nothing more than deferred wages and therefore are only peripherally related to ERISA. *See United States v. Carter,* 353 U.S. 210, 220 (9th Cir. 1957) ("these contributions are as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash").

Indeed, the precedent was established in the closely analogous situation presented in *United States v. Carter,* 353 U.S. at 210, where the issue was the liability of a surety to fringe benefit funds on a payment bond furnished by a contractor, as required by the Miller Act (40 U.S.C. § 270a *et seq.*), for the protection of persons furnishing labor or materials for the construction of federal buildings. The statute provided that every "person who has furnished labor or material in the work provided for in such contract . . . shall have the right to sue on such payment bond . . . for the sum justly due him." (40 U.S.C. §270b(a)). Compare Mass. Gen. L. ch. 149, § 29. The Supreme Court stated: "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings. . . ." 353 U.S. at 216.

The Court concluded that the trustees of the funds could maintain an action for wages and benefits on the performance bond for a public building. The Supreme Court reasoned in part that the "contributions were a part of the compensation for the work to be done by [the] employees" and the trustees "stand in the shoes of the employees and are entitled to enforce their rights." *Carter, supra*, 217-218, 220. There is, then no substantive difference between the Massachusetts bond statute and the Miller Act except that the Miller Act applies to federal buildings and the performance bond statute applies to state buildings. If the preemption rules are expanded to subsume *Carter,* Local 4 workers would have full wage protection on a federal surety bond

when they build the new federal courthouse but not when they build a hanger at Logan Airport. In *Minn. Chapter, supra,* at 980, preemption would impair the purposes of the Fitzgerald Act, 29 U.S.C. § 50, and here ERISA preemption would bar the protections of the Miller Act as made available to Massachusetts participants. *See also, Textile Workers Union of America v. Lincoln Mills of Ala.,* 353 U.S. 458 (1957). "Congress expected that a federal common law of rights and obligations under ERISA plans would develop"; *Kwatcher v. Massachusetts Service Employment Pension Fund,* 879 F.2d 957, 976 (1st Cir. 1989). The federal common law incorporation of this state Miller Act law as federal law carries out the American tradition of providing security to laborers engaged in construction work.

ERISA requires a state to ignore the existence of ERISA benefits when considering overall remuneration to workers. The Court has allowed the inclusion or implication of ERISA plans in generally valid state legislation. *See Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, at 106 and 108 (1983) (approving disability benefits requirements that could be satisfied through ERISA plans). Indeed, a law would be preempted if it counted all remuneration to workers *except* benefits from ERISA plans, for this would be special treatment. Benefits "payable on a regular basis from the general assets of the employer," *Massachusetts v. Morash,* 490 U.S. 107, 116 (1989), and that "create[ ] no need for an ongoing administrative program for processing claims and paying benefits," *Fort Halifax,* 482 U.S. at 12, are not preempted. Similarly, the statute should be "meaningfully applied" in the absence of ERISA plans if a public works contractor satisfied the benefits component of a given prevailing wage by making contributions for non-ERISA benefits, or by paying the equivalent in case. Because states enact their own wage and non-ERISA benefits regulations, *Morash,* 490 U.S. 107; *Fort Halifax,* 482 U.S. 1; *Shaw,* 463 U.S. 85, or collection laws, *Mackey v. Lanier Collections Agency & Ser., Inc.,* 486 U.S. 825 (1988),

employers must adjust their operations according to locale. This administrative and financial burden arises from the "patchwork scheme" of our federal system, a system whose "separate spheres of governmental authority," were not preempted by ERISA. Petitioners submit that USF&G's position requires an expansion of ERISA preemption that far exceeds congressional intent and contradicts the plain meaning of the statute.

II.

UNDER THE LAW OF MASSACHUSETTS, THE RESPONDENTS ARE LIABLE AS SURETIES.

This case turns on whether USF&G, under the terms of its bond, is responsible for the contributions upon Ashland's failure to make them. As the obligee sustained damages by the breach of contract, USF&G is liable for damages. Proof was adduced in the lower court that damages were suffered by petitioners. *See Continental Bronze Co. v. Salvo & Armstrong Steel Co., Inc.*, 8 Mass. App. Ct. 799, 397 N.E. 2d 1143 (Mass. App. Ct. 1979); *Local 538, etc. v. United States Fidelity and Guaranty Company,* U.S. Dist. Ct. Vermont, Slip Op. 2:93-cv-69, *appeal pending in Second Circuit*; *Couch on Insurance 2d* 57:129-134 and cases cited therein.

Allowing a surety to be sued under state surety law, poses no threat to the ERISA framework under which employers, plan trustees or plan sponsors must operate. *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1569 (11th Cir. 1988). In *Miami Valley Carpenters Dist. Council Health & Welfare Fund v. USF&G Company,* 590 F. Supp. 61 (D.C. Ohio 1984), a local union and employee trust fund sued USF&G, the respondent in the instant case, to enforce surety bonds purchased by the contractor at the Union's behest. The bonds guaranteed payments that the contractor was obligated by its collective bargaining agreement

to make to the funds and the Union. The court held that USF&G's liability arose "from the surety bonds rather than from the terms of the plan or a collective bargaining agreement." *Id.* at 66. The court expressly found that ERISA did not apply to that obligation.

What petitioners seek as damages are unquestionably deferred wages as they are withheld from the employees' wages, at the employees' request, for payment to the Union. In this case, wages were withheld but never paid.

As a result, USF&G is liable for the obligation to petitioners as a matter of law. This right arises from the surety's voluntary undertaking to guarantee the contractual obligation spelled out in the bond. The failure of the lower court to apply state surety law results in an unfortunate result. The judgment in favor of the surety effectively prevents those claimants, whose contract terms require fringe benefit payments, from asserting claims against a bond while permitting all other claimants to do so. This led to highly inequitable results. A materialman, for example, whose contract factored in the cost of health coverage for its employees would be permitted to recover the full measure of its damages from the surety, whereas claimants whose contracts expressly apportioned labor costs between wages and fringe benefits such as health care would be prohibited from full recovery. *See Couch on Insurance 2d,* Vol. 15A, § 57: 115-128 (1994 ed.).

Moreover, it is highly inequitable for USF&G to accept hefty premiums on this $23 million performance bond but meanwhile escape providing labor, material and benefits payments.

III.

ERISA'S INSURANCE EXEMPTION BARS PREEMPTION.

The insurance savings clause of ERISA bars preemption of this claim because Mass. Gen. L. ch. 149, § 29 regulates insurance. "While § 514(a) of ERISA broadly preempts state laws that relate to an employee-benefits plan, that preemption is substantially qualified by an 'insurance saving clause,' § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). . ." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 733 (1985). The mandated performance bond statute as applied to insurance companies like USF&G is a "law which regulates insurance," and therefore is saved from the application of the preemption clause of ERISA. *See Metropolitan Life,* 471 U.S. 733-734. This Court is considering similar problems in *Cuomo v. Travelers, cert. granted,* October 7, 1994, Docket Nos. 93-1408, 93-1404, 93-1415.

Labor and materialmen's bonds are subject to extensive state regulation. *See Metropolitan Life*, 471 U.S. 728, n.4, citing *New York Life Ins. Co. v. Hardison,* 199 Mass. 190, 85 N.E. 410 (1908). State laws, discussed in *Metropolitan Life, id.* at 727-728, governing solvency, qualification of management, and claims practices such as Mass. Gen. L. ch. 176D, or rates, apply to performance bond insurers. Mass. Gen. L. ch. 175, § 47B was not preempted by the Supreme Court in *Metropolitan Life* and Mass. Gen. L. ch. 149, § 29 should not be preempted by this Court.

There is no reason to favor insurance laws designed to promote public health, but not insurance laws designed to insure payment of wages and benefits. A labor and materialmen's bond statute does not regulate labor-management relations as such, or affect the free play of forces between labor and management.

Metropolitan Life, 471 U.S. 736. Mass. Gen. L. ch. 149, § 29, like Mass. Gen. L. ch. 175, § 47B, obviously regulates the spreading of risks: it was intended that the risk of defaults in the payments of workers should be shared. *Metropolitan Life*, 471 U.S. 743. Mass. Gen. L ch. 149, § 29 directly regulates an integral part of the relationships between insurer and policyholder by establishing the policyholder relationship with the surety, general contractor and fund obligee on the performance bond. The practice of writing labor and materialmen's bonds is limited to entities within the insurance industry. The lower court relies on Mass. Gen. L. ch. 175, § 107 to say that surety bonds are not insurance bonds and then to conclude that Mass. Gen. L. ch.149, § 29 does not involve insurance. But to reach such a conclusion is a misreading of the statute that instead proves that Mass. Gen. L. ch. 149, § 29 regulates insurance. Mass. Gen. L. ch. 175, § 107 brings the performance bond directly under the *Metropolitan Life* standard because it says "the bonds on which such company becomes surety shall not be deemed insurance contracts as defined in section 2, *but the company shall otherwise be subject to this chapter so far as applicable and insurance agents and brokers shall in respect to such bonds be subject to all the provisions of this chapter applying to them in respect to insurance contracts.*" Emphasis added. Hence by virtue of Mass. Gen. L. ch. 175, § 107, Mass. Gen. L. ch. 149, § 29 clearly is regulated by the insurance statutes. *See also,* Mass. Gen. L. ch. 175, § 105.[4]

---

4. A recent advisory opinion of the United States Department of Labor under which a surety-insurer was responsible for the payment of obligations of a trust was a "fully insured arrangement" for purposes of ERISA. USF&G's role under the surety bond in the instant action is indistinguishable from the surety in the advisory opinion and casts serious doubt on the conclusions of the District Court that surety bonds are not specifically directed toward the insurance industry. *See* Advisory Opinion dated April 5, 1993, W.L. 171827*1 (ERISA).

The lead Massachusetts case interpreting Mass. Gen. L. ch. 149, § 29 is a case which obviously regulates insurance. *See Peters v. Hartford Accident & Indemnity Co.*, 377 Mass. 863, 389 N.E.2d 63 (Mass. 1979). In the *Hartford* case, the Supreme Judicial Court defined expressly the duties of Hartford Accident & Indemnity Company pursuant to Mass. Gen. L. ch. 149, § 29. The court held that the trustees of a union pension fund were entitled to maintain an action against the general contractor's surety, Hartford Accident and Indemnity Company. This was the holding even though the employer was primarily liable for the contributions to the funds, was a subcontractor, and had no contractual relationship with the contractor principal on the bond written by Hartford Accident & Indemnity Company. Hence, as Mass. Gen .L. ch. 149, § 29 regulates insurance, ERISA does not preempt the statute. The lower court erred in its conclusion that this case has been implicitly overruled because the reality is that the case is consistent with *Metropolitan Life*.

Mass. Gen. L. ch. 149, § 29 creates a contractual obligation between the bonding company and the contractor or subcontractor who is required by law to take out a bond, which is quite different from the mechanics' lien situation discussed in *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 19-20 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992) so that the case should be limited to its facts. In *MIT*, the court held that the state mechanics' liens statute was preempted by ERISA. The logic of the *MIT* case does not extend to the Trust Funds' right to make a wage claim against the payment bond in the instant case. As third-party beneficiaries of the contractual relationship between the surety and the contractor, the Trust Funds are simply exercising their right to collect the wage benefits which are due as a result of the labor performed by the Trust Funds' participants. Besides, under Massachusetts law, it is illegal to have insurance that does not provide coverage.

CONCLUSION

ERISA preemption applies only to benefit plans and not to mere reference to benefits. The Massachusetts law here refers to benefits but not to the benefit plan. The case should therefore be remanded as there should be no ERISA preemption of the Massachusetts statute, especially where losses to participants are substantial and the "state laboratory of democracy" can devise participant protections.

The statute governing payment of participants working for defaulting subcontractors is clearly within the scope of the traditional police powers of the state of Massachusetts. This Court should clarify differing results reached by the Eighth Circuit, Third Circuit, and First Circuit in the instant action as to the preemptive reach of ERISA to statutes regulating labor and wages. The lower court did not, in the alternative, have to reach all of these preemption issues if it simply applied to a written performance bond contract the Massachusetts law of suretyship.

In the final analysis, to rule that a performance bond statute is outside of the ambit of the regulation of insurance blinks at reality and at the totality of the Massachusetts insurance statutory scheme of performance bonds.

As a result, this Court should grant the Petitioners' application for a writ of certiorari.

Respectfully submitted,

ROBERT O. BERGER, III
Attorney for Petitioners
470 Atlantic Avenue
11th Floor
Boston, MA 02210
(617) 423-7575

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 31, 1995

United States Court of Appeals
For the First Circuit

No. 94-2046

WILLIAM WILLIAMS, ETC., ET AL.,

Plaintiffs, Appellants,

v.

ASHLAND ENGINEERING CO., INC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *Senior U.S. District Judge*]

Before

Selya, Boudin and Stahl, *Circuit Judges.*

Robert O. Berger for appellants.

Bradford R. Carver, with whom *Edward F. Vena, Michael S. Levitz,* and *Vena, Truelove & Riley* were on brief, for appellees.

Appendix A

January 31, 1995

SELYA, *Circuit Judge.* We are reminded today that malapropisms, despite their semantic shortcomings, often describe the human condition with unerring accuracy. There are, for example, certain situations that actually do evoke the sensation of "*déjà vu* all over again."[1] We explain below why this appeal falls into that category.

In *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992), the fiduciary of several union-sponsored employee benefit plans brought suit to enforce a lien on real property owned by a university. He alleged that an electrical contractor hired to construct improvements to school buildings had employed union members to do the work; that the contractor, heedless of its obligations under a collective bargaining agreement, neglected to defray the workers' employee benefit contributions; and that a state statute, Mass. Gen. L. ch. 254, quoted in the margin,[2]

---

1. This epigram is often attributed to Lawrence P. (Yogi) Berra, a man as famous for mangling the English language as for belting baseballs. Berra coined many aphorisms — but not this one. *See* Ralph Keyes, *Nice Guys Finish Seventh; Phrases, Spurious Sayings and Familiar Misquotations* 152 (1992) (noting that "although this is commonly cited as a 'Berra-ism,' Yogi Berra denies ever saying it"). The phrase's origin is unknown.

2. The statute provides in relevant part:

> A person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure upon land, by virtue of an agreement with, or by consent of, the owner . . . shall . . . have a lien upon such building or structure . . . .

(Cont'd)

authorized the fiduciary to collect unpaid contributions by asserting a mechanic's lien against real property that had been improved through the plan participants' labor. *See McCoy*, 950 F.2d at 15. We held that the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988), and specifically, ERISA 514(a), 29 U.S.C. § 1144(a) (commanding that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"), preempted use of the Massachusetts mechanic's lien law to recoup the unpaid contributions. *See McCoy*, 950 F.2d at 18-20.

The case at bar is hauntingly reminiscent of *McCoy*, and, thus, triggers the sense of *déjà vu*. Appellants are the trustees of certain funds (the Funds) maintained by Local 4 of the International Union of Operating Engineers to fuel the union's employee benefit plans. In 1991, members of Local 4, then employed directly or indirectly by a subcontractor, Ashland Engineering Company (Ashland), participated in ongoing

---

(Cont'd)

> For purposes of this chapter, a person shall include any employee of any employer and the trustee or trustees of any fund or funds, established pursuant to section 302 of the Taft Hartley Law (29 USC 186), providing coverage or benefits to said person. The trustee or trustees of any such fund or funds shall have all the liens under this chapter that any person has. The trustee or trustees shall also have the right to enforce said liens pursuant to this chapter.

Mass. Gen. L. ch. 254, § 1 (1990). The statute also specifically provides that "the trustee or trustees of a fund or funds, described in section one, providing coverage or benefits to any person performing labor under a written contract with a contractor, or with a subcontractor of such contractor," may file a lien notice, *id.* § 4, and enforce the lien by a civil action brought against the property owner, *id.* § 5.

construction under the auspices of the Massachusetts Port Authority (Massport). A collective bargaining agreement obligated Ashland to contribute monies to the Funds commensurate with the number of hours each union member toiled on the Massport project.

In time, Ashland experienced financial problems, became delinquent on contributions to the Funds, and abandoned the Massport project. Noting that the general contractor, R.W. Granger and Sons, Inc. (Granger), had posted a performance-and-payment bond underwritten by United States Fidelity & Guaranty Company (USF&G), the trustees sued Ashland, Granger, and USF&G in an effort to extract the unpaid employer contributions.

The trustees' amended complaint contained three counts: count 1 sought to collect payments due from Ashland, count 2 sought to collect these payments from USF&G by invoking the Massachusetts statute under which the bond had been posted,[3]

---

3. The bond statute provides in pertinent part that, when state officials contract for construction of public buildings, they

> shall obtain security by bond . . . for payment by the contractor and subcontractors for labor performed or furnished and materials used or employed therein . . . . and for payment by such contractor and subcontractors of any sums due trustees . . . authorized to collect such payments from the contractor or subcontractors, based upon the labor performed or furnished as aforesaid, for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits which are payable in cash and provided for in collective bargaining agreements . . . .

Mass. Gen. L. ch. 149, § 29 (1990).

and count 3 sought to reach an asset of Ashland purportedly held by Granger — the bond — and to apply the proceeds to Ashland's debt.

Ashland did not defend and, therefore, count 1 is no longer velivolant. On June 1, 1993, the parties filed cross-motions for summary judgment on the two remaining counts. The district court granted the defendants' motions, concluding that ERISA preempted the section 29 claim as it pertains to employee benefit plans, and that Granger held none of Ashland's assets. *See Williams v. Ashland Eng'g Co.*, 863 F. Supp. 46 (D. Mass. 1994). Following the entry of separate judgments, the trustees appealed.

In this venue, the trustees agree that *brevis* disposition is warranted — the record reveals no genuine issues of material fact — but they contend that the lower court ruled in favor of the wrong parties. Affording plenary review, *see, e.g., Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990), we affirm.[4]

The centerpiece of the trustees' appeal — count 2 — is well within *McCoy's* precedential orbit. In *McCoy*, we acknowledged that Congress painted with a broad brush when it added an express preemption clause to the ERISA canvas. We described that clause as "sweeping" and "extensive in its scope." *McCoy*, 950 F.2d at 16. We also noted that the Massachusetts lien law at issue in *McCoy* referred specifically to the trustees of employee benefit plans and purported to grant them certain singular rights. In our view, these features rendered the law especially vulnerable

4. We eschew any independent discussion of count 3, inasmuch as we discern no error in the district court's stated reasons for granting summary judgment on that count. *See Williams*, 863 F. Supp. at 50.

to preemption, for "[s]tate statutes which expressly grant preferential benefits to ERISA plans cannot withstand the preemptive force of ERISA 514(a)." *Id.* at 20; *accord Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988). Thus, *McCoy* made clear that, at a bare minimum, state laws which "specifically refer to ERISA plans and grant them special treatment" are preempted regardless of a state legislature's good intentions or a particular law's consistency with ERISA's overall goals. *McCoy*, 950 F.2d at 18 (quoting *Mackey*, 486 U.S. at 829-30).

The statute before us today, Mass. Gen. L. ch. 149, § 29, invites comparison with the statute we confronted in *McCoy*. Section 29 requires, *inter alia*, that a general contractor working on a public project furnish bond to secure payment of "any sums due trustees . . . for health and welfare plans." Such plans come under the protective umbrella that ERISA spreads over the workplace. *See* 29 U.S.C. § 1002(1)(B), (3) (defining covered employee welfare benefit plans); *see also McCoy*, 950 F.2d at 19-20. Since the statue specifically refers to ERISA-regulated employee benefit plans, and provides them with a special source of recovery for unpaid employer contributions, *McCoy* governs. Hence, the bond statute, as it applies to employee benefit plans, is preempted.

Appellants balk at the characterization of their case as *McCoy* redux. They loose an avalanche of arguments, but none is persuasive. Only four of these arguments require comment.

First: Appellants launch a ferocious attack on *McCoy*, intimating that it is wrongly decided and, therefore, should be limited to its facts. Statutes like the mechanic's lien law or the bond law, they tell us, affect employee benefit plans in "too

tenuous, remote, or peripheral a manner," *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983), to warrant a conclusion that the statutes "relate to" such plans. This attack is wide of the mark.

First and foremost, we believe that our earlier opinion was — and is — clearly correct (that it is, so to speak, the real *McCoy*). And we perceive no rational basis on which to distinguish between the mechanic's lien law and section 29 for the purpose of gauging ERISA's preemptive reach.

Because the two statutes are quite plainly sisters under the skin, there is also a prudential barrier that blocks the path of appellants' attack. In a multi-panel circuit, newly constituted panels are, for the most part, bound by prior panel decisions closely on point. *See, e.g., Jusino v. Zayas*, 875 F.2d 986, 993 (1st Cir. 1989); *Lacy v. Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 479 U.S. 888 (1986). In this instance, we are bound by *McCoy*.

To be sure, there are two exceptions to this manifestation of *stare decisis* principles. An existing panel decision may be undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling. This exception is inapposite, for nothing of the kind has transpired here. The second exception pertains to those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind. *See generally Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (discussing "complex relationship . . . between a court and its own previous decisions").

Appellants try to wriggle through this loophole. They suggest that a case recently decided by the Third Circuit casts a new light on ERISA preemption by focussing on "whether the existence of ERISA plans is necessary for the statute to be meaningfully applied," *Keystone Chapter, Etc. v. Foley,* 37 F.3d 945, 957 (3d Cir. 1994), and that this shifted focus renders *McCoy* obsolete. However, appellants mischaracterize the holding in *Keystone.* There, the court reviewed a state minimum wage statute that did not refer explicitly to ERISA plans. After finding that the statute failed to single out such plans for special treatment, the court invoked the meaningfulness test to determine whether the statute might be said to "relate to" ERISA plans despite the absence of an express connection. *See id.* at 954-57. Since section 29 does single out ERISA plans for special swaddling, there is no need to consider the *Keystone* test in this case.[5]

Second: Next, the trustees contend that section 29 is, in effect, a law regulating insurance and, therefore, is shielded from preemption by ERISA § 514(b)(2)(A), 29 U.S.C. §§ 1144(b)(2)(A) (a savings clause that, *inter alia,* renders ERISA preemption inapplicable to "any law of any State which regulates insurance"). This contention lacks force. In order to "regulate[] insurance" within the purview of this exception, a law must not merely have an impact on the insurance industry, or on particular insurance products, but must be directed *specifically* toward the business of insurance. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 50 (1987); *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739-47 (1985). Section 29 does not satisfy this criterion for two reasons.

---

5. Indeed, the *Keystone* court itself found *McCoy* to be good authority, citing it with approval in holding that ERISA preempted a state administrative order that did specifically single out ERISA-regulated plans for special treatment. *See Keystone,* 37 F.3d at 955.

Appendix A

In the first place, although surety bonds often are furnished by insurers, surety bonds are not insurance contracts, *see* Mass. Gen. L. ch. 175, § 107, and they are not subject to the commonwealth's insurance laws. *See Luso-Am. Credit Union v. Cumis Ins. Soc., Inc.*, 616 F. Supp. 846, 848 (D. Mass. 1985); *General Elec. Co. v. Lexington Contracting Corp.*, 292 N.E.2d 874, 876 (Mass. 1973). In the second place, section 29 only requires the posting of an acceptable bond, not necessarily the posting of a bond underwritten by an insurance company. A cash bond or a bond backed by, say, a letter of credit, surely would suffice. In a real sense, then, section 29's impact on the insurance industry is happenstance. Consequently, the statute cannot plausibly be deemed to be directed toward, or to regulate, the business of insurance.

Third: Appellants claim that, here, preemption is beside the point because the bonding company waived the defense by failing to assert it in the pleadings. This claim prescinds from USF&G's answer to the trustees' complaint — an answer that did not mention preemption in so many words, but, rather, contained a general denial and raised, as an affirmative defense, failure to state a claim upon which relief could be granted.[6] On the facts of this case, however, appellants' claim is composed of more bleat than wool.

Generally speaking, a party must set forth all affirmative defenses in the pleadings, on pain of possible forfeiture. *See* Fed. R. Civ. P. 8(c);[7] *see also Conjugal Partnership v. Conjugal*

6. USF&G also raised a second affirmative defense implicating appellants' supposed noncompliance with conditions precedent to recovery set forth in the bond. Given the posture of this appeal, we need not discuss the second affirmative defense.

7. Rule 8(c) requires parties, "[i]n pleading to a preceding pleading," to "set

(Cont'd)

Partnership, 22 F.3d 391, 400 (1st Cir. 1994). Here, although USF&G's answer did not specifically mention a preemption defense, it did contain a broader Rule 12(b)(6) defense that was capable of encompassing preemption. *Cf. McCoy*, 950 F.2d at 22-23 (upholding preemption-based dismissal pursuant to Rule 12(b)(6)). The purpose of Rule 8(c) is to give the court and the other parties fair warning that a particular line of defense will be pursued. *See, e.g. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1970); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1226 (1st Cir. 1994). Hence, a defendant who fails to assert an affirmative defense at all, or who asserts it in a largely uninformative way, acts at his peril. *See, e.g., FDIC v. Ramirez-Rivera*, 869 F.2d 624, 626 (1st Cir. 1989).

In determining whether general, non-specific language in a defendant's answer, as was used here, suffices to preserve an affirmative defense, an inquiring court must examine the totality of the circumstances and make a practical, commonsense assessment about whether Rule 8(c)'s core purpose — to act as a safeguard against surprise and unfair prejudice — has been vindicated. In this case, USF&G complied with the spirit, if not the letter, of Rule 8(c). Well before the close of discovery — and six months prior to the filing of the cross-motions for summary judgment USF&G wrote to appellants and amplified its position, asseverating that count 2 should be dismissed under Rule 12(b)(6) because ERISA preempted section 29. In the papers accompanying the cross-motions for summary judgment, both sides briefed the preemption issue. Thus, no ambush occurred.

(Cont'd)

forth affirmatively" various enumerated defenses, as well as "any other matter constituting an avoidance or affirmative defense." While preemption is not listed specifically in the enumeration, it is a "matter constituting an avoidance," and, thus, ordinarily comes within the ambit of the rule. *See, e.g., Keenan v. Dow Chem. Co.*, 717 F. Supp. 799, 808-09 (M.D. Fla. 1989).

Where, as here, a plaintiff clearly anticipates that an issue will be litigated, and is not unfairly prejudiced when the defendant actually raises it, a mere failure to plead the defense more particularly will not constitute a waiver. *See Conjugal Partnership*, 22 F.3d at 401; *Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986).

Fourth: Appellants' final attempt to resuscitate their claim against USF&G is hardly worth mentioning. It involves the resupinate assertion that the Supremacy Clause of the Federal Constitution, U.S. Const. art. VI, cl. 2, bars preemption of section 29. This assertion is doubly flawed. For one thing, it is new to the case, and accordingly, it is procedurally defaulted. *See, e.g., McCoy*, 950 F.2d at 22 ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal."). For another thing, it takes a topsy-turvy view of preemption. After all, when the Supremacy Clause is implicated, federal law trumps state law, not vice versa. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

We need go no further. The district court astutely concluded that past is prologue, and looked to *McCoy*. *See Williams*, 863 F. Supp. at 48. We agree that *McCoy* controls. Hence, Mass. Gen. L. ch. 149, § 29, as it applies to employee welfare benefit plans, is preempted by ERISA § 514(a). The trustees' suit, therefore, fails.

Affirmed.

APPENDIX B — JUDGMENT AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 12, 1994

William WILLIAMS, et al.,

Plaintiffs,

v.

ASHLAND ENGINEERING CO., INC., et al.,

Defendants.

Civ. A. No. 92-11733-WJS.
United States District Court,
D. Massachusetts.

Sept. 12, 1994.

* * *

Robert O. Berger, III, Boston, MA, for plaintiffs.

Robert E. Riley, Edward F. Vena, Michael S. Levitz, Vena, Truelove, Riley & Domestico, Boston, MA, for defendants.

MEMORANDUM AND ORDER
ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

SKINNER, Senior District Judge.

The plaintiffs are trustees of the International Union of

Appendix B

Operating Engineers Local 4 Health and Welfare Fund, an employee benefit plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* Local 4 members performed heavy machinery work for defendants Ashland Engineering Company, Inc., C & B Construction Company, Inc., and Ashanti/Ashland (collectively, "Ashland"), the subcontractors for a Massport construction project. Ashland abandoned performance and became delinquent in its employer contributions to the Fund. Count I of the amended complaint is a claim against Ashland for employer contributions under § 502(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1132(a)(3)(B)(ii).[1] Ashland has not defended this action.

Defendant R.W. Granger and Sons, Inc. ("Granger"), the general contractor for the Massport project, obtained a surety bond from defendant United States Fidelity and Guaranty Company ("USFG") to secure payment for labor, materials, employer contributions to "health and welfare funds," and other expenses of the Massport project, as required by Mass.Gen.L. c. 149 § 29.[2] The payee of the bond is Massport. Count II states a

---

1. Section 1132(a)(3)(B) authorizes civil actions "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan [.]"

2. Section 29 provides in part:

> Officers or agents contracting on behalf of the commonwealth . . . or other public instrumentality for the construction . . . of public buildings . . . shall obtain security by bond . . . for payment by the contractor and subcontractors for labor performed or furnished and materials used or employed therein. . . . [and] for

(Cont'd)

§ 29 claim against USFG for payment under the bond. Count III seeks to reach and apply the bond, allegedly an asset of Ashland within Granger's control, to Ashland's debt.

The plaintiffs move for summary judgment on Counts II and III. USFG and Granger move for summary judgment on the same counts. At issue is whether ERISA preempts the cause of action created by Mass.Gen.L. c. 149, § 29, where trustees of an ERISA plan sue to collect the equivalent of unpaid employer contributions.

I. ERISA preemption

The plaintiffs argue that USFG and Granger have waived the defense of preemption by not raising it as an affirmative defense. USFG's answer asserted only that "[p]laintiffs have failed to state a claim for which relief may be granted."

Under Fed.R.Civ.P. 8(c), a party "pleading to a preceding pleading ... [shall] set forth affirmatively" any matter

---

(Cont'd)

> payment by such contractor and subcontractors of any sums due trustees ... authorized to collect such payments from the contractor or subcontractors, based upon the labor performed or furnished as aforesaid, for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits which are payable in cash and provided for in collective bargaining agreements between organized labor and the contractor or subcontractors; provided, that any such trustees ... shall ... be entitled to the benefit of the security only in an amount based upon labor performed or furnished as aforesaid for a maximum of two hundred and forty consecutive calendar days.

"constituting an avoidance or an affirmative defense." Preemption has been held to be an affirmative defense. See 5 Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1271, at 442 n. 51 (1990) (collecting cases). USFG should have set forth preemption in its answer, or at least moved to amend its answer before moving for summary judgment. *See Kennan v. Dow Chemical Co.*, 717 F.Supp. 799, 808-09 (M.D.Fla.1989).

The purpose of Rule 8(c), however, is to protect against unfair surprise. The plaintiffs do not claim that they have been prejudiced in any way (such as by failure to take discovery on the issues material to preemption). Counsel for USFG and Granger sent the plaintiffs a written analysis of the preemption defense nearly six months before moving for summary judgment. *See* Second Aff. of USFG Counsel, Ex. A. Rather than "dispos[e] of substantial legal questions on mere technicalities of pleading rules," I will consider the preemption defense. *In re Air Crash Disaster at Stapleton Int'l Airport,* 721 F.Supp. 1185, 1186 (D.Colo.1988).

In general, ERISA preempts all state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). Mass.Gen.L. c. 149, § 29 "relate[s] to" ERISA plans because it singles out such plans for special treatment. Plan trustees are entitled to the benefit of the bond, even though the plans themselves do not furnish the labor. *Cf. Chestnut-Adams Ltd. v. Bricklayers Trust,* 415 Mass. 87, 612 N.E.2d 236, 240 (1993) (explaining similar feature of Massachusetts' mechanic's lien statute). However, the trustees' entitlement is limited to "an amount based on labor performed or furnished . . . for a maximum of two hundred and forty consecutive calendar days." This disparate treatment (favorable as well as unfavorable) makes § 29 grist for the preemption mill. *See Mackey v. Lanier Collection Agency &*

Serv., 486 U.S. 825, 829, 108 S.Ct. 2182, 2185, 100 L.Ed.2d 836 (1988) ("we have virtually taken it for granted that state laws . . . 'specifically designed to affect employee benefit plans' are pre-empted under [29 U.S.C. § 1144(a)]"); *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 18-20 (1st Cir.1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992).[3]

Moreover, Mass.Gen.L. c. 149, § 29 creates a new mechanism for enforcing rights guaranteed by ERISA. Plan fiduciaries may bring a civil action to "enforce any provisions of [ERISA] or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B)(ii). Because "ERISA's civil enforcement remedies were meant to be exclusive," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987), the additional remedy under § 29 is therefore preempted. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484, 112 L.Ed.2d 474 (1991) ("[e]ven if there were no express pre-emption in this case, the Texas cause of action would be pre-empted because it conflicts directly with an ERISA cause of action").[4]

---

3. In *Mackey*, 486 U.S. at 838 n. 12, 108 S.Ct. at 2190 n. 12, the Supreme Court "conclude[d] that *any* state law which singles out ERISA plans, by express reference, for special treatment is preempted." This "considered dictum" is binding upon the courts of this circuit. *McCoy*, 950 F.2d at 19. It rebuts the plaintiffs' assertion that the effect of § 29 on ERISA plans to "too tenuous, remote, or peripheral . . . to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 409 (1983).

4. It is immaterial that the § 29 action would normally be brought against the surety rather than the delinquent employer. *See McCoy*, 950, F.2d at 18-20 (ERISA preempts Massachusetts' mechanic's lien law that allows plans to collect the equivalent of unpaid employer contributions from the owner of the property improved through the labor of plan participants). Like the lien law, § 29 substitutes "a new (and perhaps deeper) pocket from which monies owed may be repaid." *Id.* at

(Cont'd)

Appendix B

The plaintiffs argue that § 29 is saved from preemption because it "regulate[s] insurance" within the meaning of ERISA's saving clause, 29 U.S.C. § 1144(b)(2)(A). Even if most surety bonds are offered by insurance companies, that factor alone does not trigger the saving clause. A surety bond is not an insurance contract, *see* Mass.Gen.L. c. 175, § 107. Surety bonds are not subject to Massachusetts' insurance laws. *Luso-Am. Credit Union v. Cumis Ins. Soc., Inc.*, 616 F.Supp. 846, 848 (D.Mass.1985) (citing *General Electric Co. v. Lexington Contracting Corp.*, 363 Mass. 122, 292 N.E.2d 874 (1973)). "A common-sense view of the word 'regulates' " suggests that "in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life*, 481 U.S. at 50, 107 S.Ct. at 1554 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)). "Under this common sense view, G.L. c. 149, § 29 does not regulate insurance. . . ." *Trustees of the Iron Workers District Council v. Aetna Cas. and Surety Co.*, Suffolk Superior Court, C.A. No. 88-2298, slip op. at 8 (May 1, 1991) (USFG Counsel Aff. Ex. C).[5]

(Cont'd)

18. This substitution of defendants directly affects the plan's enforcement of its ERISA rights. By contrast, where a surety, pursuant to a settlement agreement, guarantees an employer's contributions to a pension plan and exposes itself to suit by the plan, "the involvement of a pension plan is a remote rather than central consideration" in a dispute over the terms of the settlement. *See Gould, Inc. v. Pension Ben. Guar. Corp.*, 589 F.Supp. 164, 168 (S.D.N.Y.1984).

5. The Supreme Court has also drawn guidance from the three criteria relevant to determining whether a practice falls under the "business of insurance" for purposes of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*:

> [*F*]*irst*, whether the practice has the effect of transferring or spreading the policyholder's risk;

(Cont'd)

Appendix B

In *Peters v. Hartford Accident & Indemnity Co.*, 377 Mass. 863, 389 N.E.2d 63, 63-64 (1979), the Supreme Judicial Court held that plan trustees may maintain a § 29 action against the surety for a sub-sub-contractor's unpaid employer contributions. Even if *Peters* had expressly ruled against preemption, it must be deemed overruled by subsequent Supreme Court decisions on the scope of ERISA's preemption and saving clauses. I hold that ERISA preempts Mass.Gen.L. c. 149, § 29 as it concerns the rights of ERISA plans. USFG's motion for summary judgment on Count II is accordingly **allowed.** Granger's motion for summary judgment is also **allowed** with respect to any direct claim against Granger pursuant to § 29.

II. The reach and apply claim

Count III of the amended complaint attempts to reach and apply the bond toward Ashland's unpaid employer contributions, on the theory that the bond is an Ashland asset within Granger's control. Ashland has no right to payment for its own arrearage.[6]

(Cont'd)

> *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry. *Union Life Ins. Co. v. Pireno,* 458 U.S. 119, 129 [102 S.Ct. 3002, 3008-09, 73 L.Ed.2d 647] (1982) (emphasis in original).

Metropolitan Life Ins. Co., 471 U.S. at 743, 105 S.Ct. at 2391. It is unnecessary to rehearse the McCarran-Ferguson criteria to reach a foreordained conclusion. Section 29 is plainly not limited to entities within the insurance industry, and indeed does not concern an insurance "policy relationship" at all.

6. I can make no sense of the plaintiffs' claim that "[t]he Employers (Cont'd)

Granger bound itself to pay *Massport* the amount stated in the bond, on condition that its obligation to Massport would be "null and void" if it "pay[s] for all labor performed or furnished and for all materials used or employed" in the Massport contract. Chelauski Aff. Ex. A. While Mass.Gen.L. c. 149, § 29 gives claimants other than Massport a right to payment under the bond, that statute is preempted as applied to the plaintiffs.

The plaintiffs have submitted no evidence to show that Granger has any assets of Ashland that can be applied to Ashland's debts. *See Evans v. Multicon Constr. Corp.*, 30 Mass.App. 728, 574 N.E.2d 395, 401 (1991) (burden on party seeking to reach assets to "point to specific property" of debtor in possession of a third party). Granger's motion for summary judgment on Count III is accordingly **allowed.**

Conclusion

The plaintiffs' motion for summary judgment on Counts II and III is **denied.** USFG's cross motion for summary judgment on Counts II and Granger's cross motion for summary judgment on Count III are **allowed.** There being no just reason for delay, Fed.R.Civ.P. 54(b), the clerk shall enter final judgment for USFG and Granger.

(Cont'd)

[Ashland] are entitled to obtain from Granger the amounts the Employers own plaintiffs, on the basis of this bond." Pl. Reply Mem. at 6.

APPENDIX C — ORDER DENYING PETITION FOR RECONSIDERATION ENTERED FEBRUARY 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2046

WILLIAM WILLIAMS, ET AL.,

Plaintiffs, Appellants,

v.

ASHLAND ENGINEERING CO., INC., ET AL.,

Defendants, Appellees.

ORDER OF THE COURT
Before:
Selya, Bouldin & Stahl, *Circuit Judges.*

Entered: February 21, 1995

Upon consideration of appellant's "Petition For Reconsideration Pursuant to F.R.A.P. Rule 40",

It is ordered that the petition be denied.

By The Court

s/ FRANCIS P. SCIGLIANO
FRANCIS P. SCIGLIANO, Clerk

Messrs. Berger, III, Levitz, Riley, Vena, & Carver

APPENDIX D — ORDER OF THE FIRST CIRCUIT COURT OF APPEALS DENYING THE PETITION FOR REHEARING ENTERED FEBRUARY 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2046

WILLIAM WILLIAMS, ET AL.,

Plaintiffs, Appellants,

v.

ASHLAND ENGINEERING CO., INC., ET AL.,

Defendants, Appellees.

BEFORE

Torruella, *Chief Judge.*
Selya, Cyr, Boudin & Stahl, *Circuit Judges.*

ORDER OF THE COURT

Entered: February 15, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

Appendix D

By The Court

s/ FRANCIS P. SCIGLIANO
FRANCIS P. SCIGLIANO, Clerk

Messrs. Berger, III, Levitz, Riley, Vena, & Carver

No. 94-1804

In The

Supreme Court of the United States

October Term, 1994

WILLIAM WILLIAMS, *et al.*,

Petitioners,

vs.

ASHLAND ENGINEERING, *et al.*,

-and-

UNITED STATES FIDELITY & GUARANTY CO. and R.W. GRANGER AND SONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

ROBERT O. BERGER, III
Attorney for Petitioners
470 Atlantic Avenue
11th Floor
Boston, Massachusetts 02110
(617) 423-7575

6727
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

The purpose of this supplemental brief, filed pursuant to Rule 15.7, is to advise the Court of the potential significance of its recent decision in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Co., et al.*, __ U.S. __ (Slip Op.), 63 U.S.L.W. 4372 (April 26, 1995) (No. 93-1408 *et al.*) for the disposition of this petition.

In the *Travelers* case, the Court clarified the scope of the preemption provision in section 514(a) of ERISA, 29 U.S.C. § 1044, and the standards under which courts should determine whether state laws "relate to" employee benefits plans with the meaning of that provision. The *Travelers* case addressed the authority of the State of New York to impose a system of hospital surcharges that favored patients covered by certain public health insurance programs, while imposing significantly higher fees on patients covered by other insurance plans including private insurance policies and self-insured funds sponsored by health plans regulated under ERISA. In the *Travelers* litigation, both the District Court and the Second Circuit had ruled that New York hospital surcharges were preempted because they "related to" ERISA plans within the meaning of section 514(a). A unanimous Supreme Court rejected this interpretation of ERISA's preemption clause. Even under the broad language of ERISA's preemption rule, the Court emphasized, claims of preemption must be analyzed against a "starting presumption that Congress does not intend to supplant state law." __ U.S. __ (Slip. Op. at 8). Applying this standard in *Travelers,* the Court ruled that Congress did not intend to preempt state statutes such as the New York hospital surcharges that have only a tenuous or nondiscriminatory impact on ERISA plans.

Like the *Travelers* case, this petition concerns the effect of ERISA's preemption provision on a state law. The Massachusetts law in question here —Mass. Gen. L. c. 149, § 29 — established a bonding requirement for all public works contracts and

subcontracts in the Commonwealth of Massachusetts involving more than $5,000.[1] These bonding requirements ensure that full

---

1. "Officers or agents contracting in behalf of the commonwealth or in behalf of any county, city, town, district or other political subdivision of the commonwealth or other public instrumentality for the construction, reconstruction, alteration, remodeling, repair or demolition of public buildings or other public works when the amount of the contract in the case of the commonwealth is more than five thousand dollars, and in any other case is more than two thousand dollars, shall obtain security by bond in an amount not less than one half of the total contract price, for payment by the contractor and subcontractors:

• for labor performed or furnished and materials used or employed therein, including lumber so employed which is not incorporated therein and is not wholly or necessarily consumed or made so worthless as to lose its identity, but only to the extent of its purchase price less its fair salvage value, and including also any material specially fabricated at the order of the contractor or subcontractor for use as a component part of said public building or other public work so as to be unsuitable for use elsewhere, even though such material has not been delivered and incorporated into the public building or public work, but only to the extent of its purchase price less its fair salvage value and only to the extent that such specially fabricated material is in conformity with the contract, plans and specifications or any changes therein duly made;

• for payment of transportation charges for materials used or employed therein which are consigned to the contractor or to a subcontractor who has a direct contractual relationship with the contractor;

• for payment by such contractor and subcontractors of any sums due for the rental or hire of vehicles, steam shovels, rollers propelled by steam or other power, concrete mixers, tools and other appliances and equipment employed in such construction, reconstruction, alteration, remodeling, repair or demolition;

• for payment of transportation charges directly related to such rental or hire; and

• for payment by such contractor and subcontractors of any sums due trustees or other persons authorized to collect such payments from the contractor or subcontractors, based upon the labor performed or furnished as

(Cont'd)

and fair compensation will be paid to all those who provide labor and other services to contractors and subcontractors on public works projects in the Commonwealth. It protects the integrity of the Massachusetts public works industry. The protections of section 29 extend to a full range of contractor and subcontractor obligations: not simply wages earned, but also the costs of lumber and other materials purchased by workers in connection with covered employment, equipment rentals, transportation costs associated with covered jobs, and payments associated with any collectively negotiated fringe benefits, including benefits provided under supplementary unemployment benefit plans and health and welfare plans. Even though section 29 establishes a general procedure for ensuring payment of obligations arising out of Massachusetts public works projects, the First Circuit ruled that the provision was preempted under section 514(a) of ERISA to the extent that it extended to fringe benefits also regulated under ERISA. *Williams v. Ashland Engineering Co.*, 45 F.3d 588 (1st Cir. 1995). Adopting a mechanical approach to preemption similar to the one employed by the District Court and Court of Appeals in the *Travelers* litigation, the First Circuit labeled section 29 a local rule that "single[s] out ERISA plans for special swaddling" in a manner proscribed under section 514(a). *Id.* at 592.

The First Circuit's interpretation of ERISA's preemption

(Cont'd)
aforesaid, for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits which are payable in cash and provided for in collective bargaining agreements between organized labor and the contractor or subcontractors; provided, that any such trustees or other persons authorized to collect such payments for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits shall, subject to the following provisions, be entitled to the benefit of the security only in an amount based upon labor performed or furnished as aforesaid for a maximum of two hundred and forty consecutive calendar days. . . ." Mass. Gen. L. c. 149, § 29 (indentations supplied).

clause in this case is clearly inconsistent with this Court's guidance in *Travelers*. In *Travelers*, the New York surcharges extended to ERISA-covered benefit plans and even had the undisputed effect of encouraging ERISA-regulated health plans to select certain favored types of insurance coverage. Nevertheless, this Court was unanimous in concluding that the New York surcharges did not have a sufficient connection with ERISA plans to warrant preemption. As Justice Souter stressed in Part II.B of his opinion, the surcharges advanced a rational state policy of cost containment and did not excessively burden the ERISA plans in question. Much the same can be said of the Massachusetts bonding requirement at issue here. The Massachusetts statute is designed to ensure the full compensation of parties participating in public projects in the Commonwealth. While the bonding requirement does extend to some ERISA-covered fringe benefits, no burden is placed on ERISA plans, and no limitations or restrictions are placed on the kinds of fringe benefits covered. Section 29 simply treats fringe benefits the same way it treats a full range of other obligations arising out of these projects. If, as *Travelers* holds, section 514(a) of ERISA does not preempt New York's general system of hospital surcharges, it is hard to see how the clause can be interpreted to preempt the Massachusetts bonding requirement at issue here.

In light of the strong parallels between the *Travelers'* case and this petition, we respectfully request that, if the Court does not accept this case for plenary review at this time, the Court should grant this petition, vacate the judgment of the Court of Appeals, and remand the case for reconsideration in light of *New York State Conference v. Travelers Insurance Co.*

Respectfully submitted,

ROBERT O. BERGER, III
Attorney for Petitioners